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No. 06-134

Supreme Court, U.S.
FILED
FEB 23 2007
OFFICE OF THE CLERK

In The Supreme Court of the United States

THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS AND THE PERMANENT REPRESENTATIVE OF MONGOLIA TO THE UNITED NATIONS,

Petitioners,

v.

THE CITY OF NEW YORK,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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QUESTIONS PRESENTED

1. Does the exception to sovereign immunity for cases "in which . . . rights in immovable property situated in the United States are in issue," 28 U.S.C. § 1605(a)(4), provide jurisdiction for a municipality's lawsuit seeking to declare the validity of a tax lien on a foreign sovereign's real property when the municipality does not claim any right to own, use, enter, control or possess the real property at issue?

2. Is it appropriate for U.S. courts to interpret U.S. statutes by relying on international treaties that have not been signed by the U.S. Government and that do not accurately reflect international practice because they have only been signed by a limited number of other nations?

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Petitioner The Permanent Mission of India to the United Nations is an agency and instrumentality of The Republic of India, a sovereign state.

Petitioner The Permanent Representative of Mongolia to the United Nations is an agency and instrumentality of Mongolia, a sovereign state.

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OPINIONS BELOW

The initial decision of the United States District Court for the Southern District of New York, dismissing Petitioners' motion to dismiss for lack of subject matter jurisdiction (Pet. App. 25-45), is reported at 376 F. Supp. 2d 429. The decision of the United States Court of Appeals for the Second Circuit affirming that dismissal (Pet. App. 1-24) is reported at 446 F.3d 365.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 2006. The petition for a writ of certiorari was filed on July 25, 2006, and was granted on January 19, 2007. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Foreign Sovereign Immunities Act of 1976 (FSIA), those contained in 28 U.S.C. § 1605, are set forth in the appendix to the petition for a writ of certiorari (Pet. App. 46-52).

STATEMENT

The Petitioners are the accredited representatives to the United Nations of the sovereign states of India and Mongolia. Both India and Mongolia own Mission buildings in New York City, which are used solely for official offices and to house diplomatic personnel and their immediate families,

and foreign government employees charged with security or administrative functions. Each of the governments requires these personnel to live at the Mission in quarters that the government provides without additional cost.

The Indian Mission is located in Manhattan, on East 43rd Street, in a building owned by the Government of India. Kamboj Affidavit, J.A. at 93. Constructed in 1993, the Indian Mission building is devoted entirely to government offices and residential apartments for the Mission's senior diplomats, their families and security personnel. Kamboj Affidavit, J.A. at 93.[1] As a matter of policy the Government of India requires its senior diplomats and security personnel to live at the Mission. Given the time difference between the Indian Mission in New York and the Ministry of External Affairs in New Delhi, the diplomats at the Indian Mission must be available day and night to respond to inquiries and communications from the Ministry and transmit reports about developments at the United Nations to the Ministry. Kamboj Affidavit, J.A. at 94-95. Housing senior diplomats at the Mission also simplifies security and encourages better participation by the diplomats and their families in social and cultural events hosted by the Mission that promote the Government of India's interests. Kamboj Affidavit, J.A. at 94-95.

The Mongolian Mission is located on East 77th Street in a building owned by Mongolia. Purejav Affidavit, J.A. at 152. The Mongolian Mission contains the offices and

[1] All the diplomats and staff residing at the Indian Mission hold G-1 or A-1 visas. Kamboj Affidavit, J.A. at 94. The United States Department of State issues G-1 visas to employees of foreign governments assigned to the United Nations, and A-1 visas to diplomats serving at a foreign sovereign's consulate. Kamboj Affidavit, J.A. at 94.

residences of the Ambassador-Permanent Representative, the Counselor, the Third Secretary, the Attaché and the administrative officer/driver. Purejav Affidavit, J.A. at 153.[2] Like the Indian government, Mongolia requires its senior diplomats and staff to live at the Mission to better fulfill their governmental and diplomatic responsibilities and to provide for their security. The time difference between the Mongolian Mission in New York and the Foreign Ministry in Ulaanbaatar is also great, requiring the diplomats at the Mongolian Mission to be available at all hours to address inquiries and communications from the Ministry and to report to the Ministry about developments at the United Nations. Purejav Affidavit, J.A. at 153.

Even though the properties in question are used exclusively to support the respective governments' diplomatic missions, the City of New York maintains that each of these buildings is subject to the City's real property tax regime. To do so, it relies on a 1958 New York state law that exempts from real property taxation only those portions of diplomatic missions to the United Nations that serve as the offices for the mission or as the residence of its "principal resident representative," *i.e.*, the ambassador or other head of the foreign government's mission. N.Y. Real Prop. Tax Law § 418(1). The Governments of India and Mongolia have declined to pay the real property taxes, however, on the ground that their entire mission premises are exempt from local real property taxation by treaty,

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[2] Since 1980, all persons who have resided in the Mongolian Mission have been employees of the Foreign Ministry or members of their families, and have held G-1 visas with the exception of the administrative officer/driver who held a G-2 visa. Purejav Affidavit, J.A. at 153.

including the Vienna Convention on Diplomatic Relations ("Vienna Convention"), *done* April 18, 1961, 23 U.S.T. 3227 and under customary international law.[3]

As of January 2003, the total amount of taxes and interest assessed by the City of New York against the Indian Mission exceeded $16 million (Amended Complaint for Foreclosure of Tax Liens, J.A. at 74-76), and the amount against the Mongolian Mission exceeded $2 million. Amended Complaint for Foreclosure of Tax Liens, J.A. at 84-87. In April 2003, the City sued each government in New York State Supreme Court to collect the taxes, to enforce statutory tax liens against their Mission properties, and for judgments of foreclosure against these properties.[4] Complaint for Foreclosure of Tax Liens (India), J.A. at 25-32; Complaint for Foreclosure of Tax Liens (Mongolia), J.A. at 40-47. India and Mongolia removed the respective actions to the United States District Court for the Southern District of New York under 28 U.S.C. § 1441(d) (J.A. at 1, 6), which provides for removal by a foreign state or its instrumentality, and the removed actions were subsequently consolidated. J.A. at 11.

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[3] Article 23 of the Vienna Convention provides in part as follows:

> "The sending State and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered." 23 U.S.T. 3227.

Article 34 extends this tax exemption to diplomatic agents who hold property on behalf of the foreign government "for the purposes of the mission."

[4] New York City's Administrative Code provides that unpaid real property taxes constitute a lien upon the property. NYC Ad. Code § 11-301. The City ultimately disavowed its foreclosure claim. March 16, 2006 Letter Brief of City of New York, Pet. App. at 83.

After discovery on the issue of jurisdiction was complete, the governments moved to dismiss the City's actions against them under the Foreign Sovereign Immunities Act of 1976, *as amended* ("FSIA"), 28 U.S.C. §§ 1602-11, which provides that, subject to existing international agreements and to the exceptions enumerated in 28 U.S.C. § 1605, "a foreign state shall be immune from the jurisdiction of the courts of the United States or of the States . . . ." 28 U.S.C. § 1604. The City relied on two alternative grounds to support jurisdiction. First, the City urged that India's and Mongolia's activities in housing their personnel within their respective missions constituted a "commercial activity carried out in the United States by the foreign state," so that a lawsuit to collect tax on such "commercial activity" was permissible under 28 U.S.C. § 1605(a)(2). Alternatively, the City claimed that its enforcement actions fell within the statutory exception to foreign sovereign immunity created by 28 U.S.C. § 1605(a)(4) for cases "in which . . . rights in immovable property situated in the United States are in issue."

The district court denied India's and Mongolia's motions to dismiss. It ruled the "rights in immovable property" exception had been satisfied, because "a tax lien directly affects a property owner's rights in the property. And a suit adjudicating the validity of such a lien therefore puts in issue the owner's rights in that property." Pet. App. at 38. The district court did not decide whether the "commercial activity" exception had also been satisfied. Pet. App. at 29 n.4.

India and Mongolia appealed the district court's order to the U.S. Court of Appeals for the Second Circuit.[5] Shortly before hearing argument, the panel invited the views of the Department of State on two issues:

> (1) whether § 1605(a)(4)'s "immovable property" exception should be "interpreted to accord" with the United Nations Convention on Jurisdictional Immunities of States and Their Property, *opened for signature* January 17, 2005, 44 I.L.M. 803, and the European Convention on State Immunity, *opened for signature* May 16, 1972, 11 I.L.M. 470, "both of which [in the panel's reading] disallow claims of immunity where proceedings relate to either: (a) a state's rights or interests in, or use of [or] possession of real property, or (b) a state's 'obligations' arising out of same[ ]"; and
>
> (2) whether "any considerations of diplomatic or foreign relations counsel a relatively narrow or expansive reading of [the FSIA's] exception for disputes in which "rights in immovable property . . . are in issue."

Letter from Clerk of Court to W. Teal of January 9, 2006, Pet. App. at 54-55.

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[5] India and Mongolia relied on the collateral order doctrine to appeal. That doctrine has been held to permit appeal to the courts of appeals in a wide variety of contexts in which the defendant claimed immunity from suit. *See Foremost McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990), *aff'd sub nom., Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992) (appeal of denial of foreign sovereign immunity); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) (appeal of denial of Eleventh Amendment sovereign immunity).

In its response to the Second Circuit's communication, the State Department pointed out that the United States was not a party to either of the two Conventions about which the panel had inquired, and that the U.N. Convention had not come into force in any jurisdiction. The State Department further explained that neither Convention "address[ed] and therefore [did] not purport to abrogate sovereign immunity from suits over tax liability," and that even if the Conventions had addressed tax disputes, their language would not help to interpret the FSIA, because that statute's immovable property exception "is drafted more narrowly."[6] Letter from N. Gueron to Clerk of Court of February 23, 2006, Pet. App. at 57, 60-61. The State Department also maintained that the district court's reliance on the City's statutory lien as a basis for jurisdiction was inconsistent with the FSIA's anti-attachment provisions, 28 U.S.C. §§ 1609-10, which preclude attachment of a foreign state's property as a basis for obtaining jurisdiction, and that the City's claim for back taxes was therefore nothing more than a "purely compensatory" claim, to which the FSIA's "rights in immovable property" exception did not apply. Pet. App. at 62-70. In response to the second question, the State Department advised the panel that "a finding of jurisdiction here could have

[6] The U.S. Government acknowledged that it had expressed a different view many years before, when the Department of Justice had submitted an amicus brief in support of an unsuccessful petition for en banc rehearing in *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (3d Cir. 1985). Letter from N. Gueron to Clerk of Court of February 23, 2006, Pet. App. at 61 n.2. Its submission explained, however, that its 1985 brief had misread the European Convention and that the drafting history of the U.N. Convention had made it clear that the still-pending Convention did not apply to tax disputes between states. *Id.*

serious implications" for this country's relationship with the United Nations, and that "bilateral relations with one of the sovereign defendants" had already been adversely affected. Pet. App. at 73-75.

The Second Circuit nevertheless affirmed the district court's denial of India's and Mongolia's motions to dismiss. Although agreeing that the City's asserted tax lien could not "create jurisdiction where none would otherwise lie" (Pet. App. at 21 n.16), the court of appeals concluded nonetheless that the sovereign governments were not entitled to immunity because their tax dispute with the City arose "directly out of their ownership of real property in the United States." Pet. App. at 21. The court of appeals acknowledged that in *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (3d Cir. 1985), on "facts very similar to those of this case," the U.S. Court of Appeals for the Third Circuit had found that Section 1605(a)(4) did not allow jurisdiction over a New Jersey municipality's real property tax enforcement action against property used by Libya's United Nations Ambassador. Pet. App. at 20 n.15. Nevertheless, the Second Circuit rejected the Third Circuit's conclusion, as well as the Department of State's analysis and advice, as reflected in its response to the court's request for its views.

On June 1, 2006, the Second Circuit stayed issuance of the mandate pending this Court's action on a petition for a writ of certiorari. After receiving the views of the Solicitor General, this Court granted certiorari on January 19, 2007.

SUMMARY OF ARGUMENT

Under the Foreign Sovereign Immunities Act of 1976, *as amended* ("FSIA"), 28 U.S.C. §§ 1602-11, United States courts lack jurisdiction over disputes involving a foreign sovereign unless one of the exceptions set forth in 28 U.S.C. §§ 1605-07 applies. 28 U.S.C. § 1605(a)(4) provides an exception to foreign sovereign immunity for cases in which "rights in immovable property situated in the United States are in issue." The court of appeals construed this exception from immunity to include not only cases in which "rights in" immovable property are "in issue," but also to include all disputes about "obligations arising directly out of such rights to or use of the property." Pet. App. at 17-18. Based on this expansive construction, the court of appeals held that Section 1605(a)(4) provides jurisdiction over suits against foreign sovereigns to collect real property taxes on buildings housing their diplomatic missions to the United Nations, because the suits purportedly "arise out of" India's and Mongolia's "use or possession of" the properties. The court of appeals was wrong for the following reasons:

I. The Second Circuit's construction of the statute as applying to all disputes "arising directly out of" immovable property finds no support in the statutory text. Section 1605(a)(4) permits jurisdiction only in cases in which the "issue" requires the court to determine "rights in" property, not obligations "arising directly out of" rights to or interests in property. Congress's choice of broad "arising under" language in other sections of the FSIA confirms that its choice of narrow "in issue" language in Section 1605(a)(4) was intentional. For example, in FSIA Section 1605(a)(5)(B) Congress used "arising out of" language to describe the scope of immunity for certain

intentional torts, and in Section 1607 Congress used "arising out of" language to provide an exception from immunity for counterclaims "arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state." 28 U.S.C. § 1607(b). In other sections of the FSIA, Congress provided exceptions from immunity when the suit is "based upon" commercial activity. 28 U.S.C. § 1605(a)(2) and (b). Where, as here, Congress chose broad "arising out of" or "based upon" language in some subsections of a statute, its choice of narrower "in issue" language in another subsection of the same statute requires that the narrower language be given a narrower construction.

II. The FSIA was intended to codify existing international practice at the time the statute was enacted. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612-13 (1992). As summarized in the Restatement (Second) of Foreign Relations Law of the United States ("Second Restatement") (1965) and confirmed by treatises and judicial decisions, that international practice limited the rights in immovable property exception to actions "contesting . . . ownership or the right to possession," and the exception did *not* apply to a lawsuit that merely "aris[es] out of a foreign state's ownership or possession of immovable property." Second Restatement § 68 and comments d and f. Section 65, comment d of the Second Restatement confirms that a territorial state may not enforce a real property tax claim against the property of a foreign state, and pre-FSIA court decisions accord with the Second Restatement. The City has conceded that no court decision prior to the FSIA had ever enforced a tax claim against a foreign government. To the contrary, the two most relevant

pre-1976 precedents concluded that customary international law prohibits such enforcement. *Republic of Argentina v. City of New York,* 25 N.Y.2d 252 (N.Y. 1969); *Reference re Tax on Foreign Legations,* [1943] 2 D.L.R. 481 (Can.).

III. The court of appeals also erred by relying on the European Convention on State Immunity, *opened for signature* May 16, 1972, 11 I.L.M. 470, and the United Nations Convention on Jurisdictional Immunities of States and Their Property, *opened for signature* January 17, 2005, 44 I.L.M. 803, to expand the scope of FSIA Section 1605(a)(4) beyond the narrow language used by Congress. Congress did *not* adopt the European Convention's language when it enacted the rights in immovable property exception. While the European Convention provides for an exception for all disputes "arising out of" immovable property, Congress chose to limit the exception in Section 1605(a)(4) to cases in which "rights in immovable property . . . are in issue." The correct inference is that Congress, having borrowed "arising out of" language from the European Convention when it enacted the counterclaim exception in Section 1607 and having rejected the same "arising out of" language from the European Convention when it enacted the rights in immovable property exception in Section 1605(a)(4), did *not* intend Section 1605(a)(4) to provide an exception for all disputes "arising out of" immovable property. Furthermore, the European Convention does not provide any basis for jurisdiction to recover real property taxes or to enforce tax liens. Rather, the European Convention's official commentary to its immovable property provision confirms that proceedings relating to "dues or taxes" are not allowed against foreign sovereigns under that exception from immunity. The

drafting history of the U.N. Convention likewise confirms that the U.N. Convention does not provide any jurisdictional basis for tax enforcement proceedings against a foreign sovereign. In contrast to these two conventions, the United States had acceded to the Vienna Convention on Diplomatic Relations ("Vienna Convention"), *done* April 18, 1961, 23 U.S.T. 3227 (entered into force with respect to the United States December 13, 1972) before the FSIA was enacted, and Congress intended the FSIA to be consistent with that treaty. The Vienna Convention precludes a receiving state from exercising civil jurisdiction to enforce a real property tax claim against diplomatic agents, their families and mission staff, and Congress could not have intended Section 1605(a)(4) to provide tax enforcement jurisdiction in the face of the Vienna Convention's protections.

IV. The FSIA's legislative history contains no basis for inferring that Congress meant to depart from international practice by creating a jurisdictional basis for real property tax enforcement proceedings. The court of appeals' reliance on a passage from House Report 94-1487, 1976 U.S.C.C.A.N. 6604 (1976), was misplaced. Nothing in the House Report shows any intent to expand the statutory immovable property exception to issues beyond those needed to determine title or possession.

The City's imposition of a tax lien on real property housing a foreign sovereign's diplomatic mission does not create a right in real property within the meaning of Section 1605(a)(4). Sections 1609 and 1610 of the FSIA forbid the use of the lien to establish jurisdiction where such jurisdiction would not otherwise lie. Moreover, unlike rights to ownership, possession and occupancy of property provided by title, easements and servitudes, mere security

interests such as liens give the holder no right to own, possess, or occupy the property. Furthermore, while disputes over ownership and possession of property are decided solely on the basis of local property law, disputes over taxation of foreign governmental property, such as that occupied by foreign sovereign diplomatic missions, are governed by treaties and customary international law and implicate United States foreign policy interests. Local courts have no special competence to decide these issues, and nothing in the language or legislative history of Section 1605(a)(4) suggests that Congress intended these sensitive issues to be resolved in local courts.

In conflict with this Court's warning in *TVA v. Hill*, 437 U.S. 153, 190 (1973), the court of appeals relied on two recent appropriations acts, Pub. L. 109-102, § 543 and Pub. L. 108-447, § 543, which require the Secretary of State to deduct from foreign aid an amount equal to 110% of real property tax judgments. Neither appropriations act illustrates Congress's 1976 intent in drafting the FSIA, and these appropriations acts can be given effect, in cases where another FSIA exception from immunity applies, without rewriting the immovable property exception.

V. The separate statutory exception for actions "based upon a commercial activity," 28 U.S.C. § 1605(a)(2), is plainly inapplicable. *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993) confirms that this exception does not apply to acts that only a sovereign can perform, and the operation and staffing of a foreign mission and the deployment of its senior diplomatic personnel is peculiarly sovereign.

ARGUMENT

I. A Lawsuit to Collect Local Property Taxes Does Not Fall Within the Literal Terms of the Foreign Sovereign Immunity Act's Exception for a "Case ... in which ... Rights in Immovable Property ... Are in Issue."

As foreign sovereigns, the Governments of India and Mongolia are "presumptively immune from the jurisdiction of United States courts," as are their agencies and instrumentalities such as their Missions to the United Nations. *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993); *see also* 28 U.S.C. § 1604. The sole basis for obtaining jurisdiction over them must be found, if at all, in the Foreign Sovereign Immunities Act of 1976, *as amended*, 28 U.S.C. §§ 1330, 1602-11 (the "FSIA"); *Saudi Arabia v. Nelson*, 507 U.S. at 355. The FSIA is "a comprehensive statute containing a 'set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities.'" *Republic of Austria v. Altmann,* 541 U.S. 677, 691 (2004) (quoting *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 488 (1983)). Unless a specified exception to sovereign immunity found in the FSIA applies, the foreign sovereigns remain immune from suit in U.S. courts. *Republic of Austria v. Altmann,* 541 U.S. at 691; *see also Saudi Arabia v. Nelson*, 507 U.S. at 355. The FSIA's "immovable property" exception, 28 U.S.C. § 1605(a)(4), provides for jurisdiction in U.S. courts over claims against a foreign sovereign in which "rights in immovable property situated in the United States are in issue." The City's tax claim does not fit with the express statutory text, which excepts from sovereign immunity only a "case" in which "rights in" immovable property are "in issue." The "case" presented by

the City – that India and Mongolia owe taxes and should pay them – does not place "in issue" India's and Mongolia's "rights in immovable property." The City does not challenge or dispute India's or Mongolia's rights of ownership, use, control, possession or occupancy of the "immovable property" at issue in this case, nor does it assert that any other person has a right to disturb or encroach upon those rights in the property, such as by way of an easement.[7] India's and Mongolia's "rights in" their immovable property are simply not "in issue."

The U.S. Court of Appeals for the Second Circuit nonetheless found jurisdiction in these cases by construing the language of Section 1604(a)(4) to encompass not only cases in which "rights in" immovable property are "in issue," but also any dispute concerning any "obligations arising directly out of such rights to or use of the property," including "obligations . . . imposed by the local government as part of its property law regime." Pet. App. at 17-18 and n.13. This expansion of the statutory language to eliminate foreign sovereign immunity for all cases involving "obligations arising directly out of" any "rights to" or "use of" immovable property is inconsistent with Congress's choice of much more limited statutory language and with the pre-existing international practice that Congress intended to codify.

Congress chose language limiting the exception to "rights," not "obligations," and specifically to rights "in" property, and not, more broadly, to obligations "arising directly out of" rights to or use of property. When Congress

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[7] We discuss at Part IV.B. below the City's claim, rejected by the court of appeals, that its assertion of a tax "lien" involves such a "right."

intended in the FSIA to make the scope of immunity turn upon whether a plaintiff's claim "arises out of" identifiable acts or relationships, it knew how to do so. In the very next subsection, the FSIA addresses the scope of immunity for "any claim *arising out of* malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 1605(a)(5)(B) (emphasis added).[8] Similarly, subsection 1605(a)(2) creates a distinct statutory exception for claims "based upon" a commercial activity. 28 U.S.C. § 1605(a)(2).

In *Saudi Arabia v. Nelson*, 507 U.S. at 357-58, this Court, interpreting the "commercial activity" exception, found significance in the distinction Congress had drawn between a suit "based upon" commercial activity and one "'based upon' acts performed 'in connection with' such activity." The distinction drawn between actions in which rights in real property are "in issue," and those that "arise from" rights to or use of real property, is equally significant. The obligation of India and Mongolia to pay tax may be "in issue," but that obligation is not a "right in" real property, any more than would a dispute over the Mission's obligation to pay a

[8] This exception from jurisdiction in the FSIA is based on 28 U.S.C. § 2680(h), the Federal Tort Claims Act's exemption from liability for "intentional tort." H.R. Rep. No. 94-1487, at 21 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6620. The FTCA's "arising" language has been broadly read to preserve the sovereign immunity of the United States from suits for injury "associated in any way" with intentional tort. *Sheridan v. United States*, 487 U.S. 392, 409 (1988) (O'Connor, J. dissenting) (discussing *Kosak v. United States*, 465 U.S. 848 (1984)). Nothing in the text or legislative history of Section 1605(a)(4) remotely suggests that Congress intended to create an exception to immunity for any claims "associated in any way" with immovable property.

merchant for selling it a rug or to compensate a visitor who later slips on the rug.[9]

II. Pre-Existing International Practice Supports a Construction of the Immovable Property Exception that Preserves Immunity From Tax Enforcement Lawsuits.

Congress intended the "immovable property" exception to codify existing international practice at the time the FSIA was enacted in 1976. *Asociacion de Reclamantes v. United Mexican States,* 735 F.2d 1517, 1521 (D.C. Cir. 1984) (Scalia, J.), *cert. denied,* 470 U.S. 1051 (1985); *see generally Republic of Argentina v. Weltover, Inc.*, 504 U.S. at 612-13. To strip a sovereign state of immunity for any claim that "arises out of" its ownership of real property would not have codified pre-existing international practice, as it was understood in 1976. As the City has already conceded, "prior to the enactment of the FSIA, no court exercised jurisdiction over a real property tax dispute." Brief in Opposition to Petition for Certiorari at 15. The City's concession is more than appropriate given that, prior to the enactment of the FSIA in 1976, foreign sovereigns were immune from suit in cases "arising out of a foreign state's ownership or possession of immovable property", with a limited exception for cases in which a foreign state was sued to resolve "questions pertaining to title or the adverse interest of individual claimants." 2 Charles C. Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* 848 (2d ed. 1945); *accord*

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[9] These latter disputes may well be covered by the separate exemptions for actions based upon a "commercial activity" or caused by a "tortious act." 28 U.S.C. §§ 1605(a)(2) and (5).

Sovereign Immunity, 6 Whiteman *Digest* § 20, at 638 (1968) (*quoting* Restatement (Second) of Foreign Relations Law ("Second Restatement") § 68 cmt. d (1965)); *Reclamantes*, 735 F.2d at 1522 (pre-existing real property exception was "limited to disputes directly implicating property interests or rights to possession").

Section 65 of the Second Restatement states the general rule that a sovereign is "immune from the exercise of another state of jurisdiction to enforce rules of law."[10] Comment d to this general rule distinguishes between "prescriptive jurisdiction," which is not necessarily foreclosed by this general immunity rule, and "enforcement jurisdiction," which is foreclosed, subject only to the exceptions specified in Sections 68 and 69, which reflect, *inter alia*, the "restrictive theory" of sovereign immunity under which immunity applies only to "sovereign acts," not to "private" acts. *See* Second Restatement § 65 cmt. d; *see also id.* at § 69, reporters' note 1 (citing and embracing shift in United States policy as reflected in 1952 letter by State Department Acting Legal Advisor Jack B. Tate).[11] Remarkably, comment d to Section 65 of the Second Restatement uses as an example the inclusion of foreign governmental property on the territorial state's tax rolls,

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[10] The district court erred in relying on the Restatement (Third) of Foreign Relations Law § 455, comment b (1987). Pet. App. at 39-40. The Third Restatement, published more than a decade after the FSIA, does not purport to reflect international understanding prior to 1976. The sole authority it cites for the proposition that tax disputes are "subject to adjudication in local courts" is the text of the FSIA itself.

[11] In its brief responding to this Court's invitation, the United States has explained that the "real-property exception" predates, and is wholly independent of, the restrictive theory of immunity. Brief of United States as Amicus Curiae at 7-9.

which is merely "prescriptive", and the actual enforcement of "tax claims against the property of a foreign state," which is "enforcement" and, thus, prohibited.[12]

Section 68(b) of the Second Restatement recognizes only a narrow exception to the general "enforcement" immunity rule for an "action to obtain possession of or establish a property interest in immovable property located in the territory of the state exercising jurisdiction." Comment d to Section 68 of the Second Restatement makes clear that this exception applies only to actions "contesting . . . ownership or the right to possession," and that the exception does not apply to a lawsuit that merely "aris[es] out of a foreign state's ownership or possession of immovable property. . . . " Comment f to Section 68 reiterates that the immunity exception recognized by the section "deals solely with the immunity of a foreign state from claims of *adverse ownership interests* in [non-diplomatic] property. . . ." (emphasis added). *See also* Sovereign Immunity, 6 Whiteman *Digest* § 20, at 638 (1968) (referencing Restatement); *Documents of the Thirty-Fifth Session*, [1983] 2 Y.B. Int'l L. Comm'n 48, U.N. Doc. A/CN.4/SER.A/1983/Add.1 (Part I) ("judicial practice . . . seems to bear out the absence of immunity for proceedings involving determination of ownership of property and its acquisition of title under the internal law of the State of the *situs* by the territorial court").

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[12] A subsequent section of the Restatement makes clear that "diplomatic premises owned by the sending state" are "exempt" from both "prescription" and "enforcement of any tax or levy of the receiving state except one that represents payment for specific services rendered." Second Restatement § 77(4).

The Second Restatement accurately summarizes international practice prior to the FSIA. Indeed, only seven years before the FSIA was enacted, the City, recognizing the Second Restatement's accuracy, conceded that New York's courts lacked the power to enforce its real property tax claim against the Republic of Argentina.[13] In *Republic of Argentina v. City of New York,* 25 N.Y.2d 252 (N.Y. 1969), New York's highest court agreed with the City's concession, further holding that "principles of customary international law" entitled Argentina, the plaintiff, to a judgment declaring its consular property exempt and discharging the City's liens on that property.[14] Fundamental to the New York Court of Appeals' decision was its premise, with which the City agreed, that international law did not allow the city to "compel the payment of a tax by proceeding directly" against Argentina's property. *Id.* at 262. In light of the lack of any authority to enforce its tax claim in a judicial proceeding, the New York Court of Appeals concluded that the City's levy and assessment of a tax against

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[13] Brief of Respondent in Answer to Brief Amicus Curiae of United States at 9, *Republic of Argentina v. City of New York,* 25 N.Y.2d 252 (N.Y. 1969).

[14] The case was decided shortly before the United States acceded to the Vienna Convention on Consular Relations ("Vienna Convention"), *opened for signature* April 18, 1961, 21 U.S.T. 3227, Article 32 of which establishes, as a matter of treaty, that consular premises are immune from local real property taxes. The City therefore based its claim on the lack of an established exemption for "consular" as distinct from an exemption for diplomatic property. The New York Court of Appeals, however, recognized what Professor William W. Bishop had earlier described as "a growing tendency to recognize the immunity from taxation of both personal and real property owned by the sending state and used for the clearly public purpose of providing a consular office or residence for the consular officer." William W. Bishop, "Immunity from Taxation of Foreign State-Owned Property," 46 Am. J. Int'l Law 239, 247 (1952).

Argentina would be "a futile gesture, serving only to embarrass a friendly State without concomitant benefit to the city." *Id.* at 261.[15] Furthermore, the New York Court of Appeals reasoned that international law precluded the City from affecting the property "indirectly" by imposing a lien, which would reduce the resale value of the property. *Id.* at 262.

The New York court's ruling is consistent with the Second Restatement (which it cites at 25 N.Y.2d at 263), with scholarly writings,[16] and with the most pertinent previous judicial precedent, the Supreme Court of Canada's ruling in *Reference re Tax on Foreign Legations,* [1943] 2 D.L.R. 481 (Can.). In that decision, after a lengthy review of English and European precedents, which found "no known case in which a demand has been made to compel a diplomatic agent to pay a tax imposed by the territorial government" (*id.* at 498), the Canadian court concluded that payment of a tax "cannot be demanded by one equal sovereignty from another, or from its diplomatic agent; and there is a general acceptance of the view that

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[15] The City argued that Argentina's consulate was not entitled to the immunity accorded to "diplomatic" property. It did not argue that it was entitled to enforce its lien even against the consular property, but only that it was entitled to maintain an "inchoate" lien. Brief of Respondent at 14, *Republic of Argentina v. City of New York*, 25 N.Y.2d 252; Brief of Respondent in Answer to Brief Amicus Curiae of United States at 9, *Republic of Argentina v. City of New York*, 25 N.Y.2d 252.

[16] *See, e.g.*, John W. Foster, *The Practice of Diplomacy* 171 (1906) ("[T]he property of the mission, and the real estate occupied by the legation residence and office, if owned by the foreign government, are exempt from taxation"); Eleanor W. Allen, *The Position of Foreign States Before National Courts* 17 (1932) ("The doctrine of the subjection of real property to the jurisdiction of the local courts . . . does not supersede that of the inviolability of legation property. . . . ").

such tribute is not exigible, consistently with the principles of the law of nations." *Id.* at 492.

The Second Circuit misread these consistent expressions of international practice prior to the FSIA. It ignored Section 65 of the Second Restatement, which unambiguously prohibits actual enforcement of a tax claim against the property of a foreign state, and it misread the New York Court of Appeals' opinion in *Republic of Argentina* as recognizing that "courts had jurisdiction to hear disputes such as this one." Pet. App. at 17 n.12. Argentina was the *plaintiff* in that case; it had sued the City to *remove* the lien. The City had not sued Argentina to *enforce* its lien; it had conceded that no court could hear such a suit. The New York courts, therefore, had jurisdiction to hear Argentina's claim because Argentina had waived its immunity to suit by "initiating legal proceedings." Second Restatement § 70 and comment b (*citing National City Bank v. Republic of China,* 348 U.S. 356 (1948)).[17] Moreover, as discussed above, although the New York Court of Appeals' ultimate conclusion – that Argentina's consular property was exempt from the City's tax – reached the "merits" of the tax dispute, a fundamental underpinning of the court's conclusion was that the courts lacked jurisdiction to enforce the City's tax claim.

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[17] *United States v. City of Glen Cove*, 322 F. Supp. 149 (E.D.N.Y. 1971), which the Second Circuit cited to the same effect, is equally off the mark. The only sovereign party in that case was the United States, which successfully sued to enjoin that municipality from taxing property that housed the Permanent Representative of the Soviet Union "and his deputies." Not only was the Soviet Union not a defendant; it did not even deign to be a plaintiff.

III. The European Convention on State Immunity and the U.N. Convention on Jurisdictional Immunities Both Retain a Foreign Government's Immunity From Local Tax Enforcement Lawsuits.

Accepting that the FSIA was intended, in part, to reflect international practice, the Second Circuit sought confirmation for its expansive reading of Section 1605(a)(4) in two international conventions, neither of which has been signed or ratified by the U.S. government, as evidence of that international practice. Pet. App. at 13-16.[18] The first of these conventions, the European Convention on State Immunity ("European Convention"), *opened for signature* May 16, 1972, 11 I.L.M. 470, entered into force in 1976 when it was signed or ratified by three members of the Council of Europe and has subsequently been ratified by a handful of other members of the Council of Europe.[19] The other convention is the United Nations Convention on Jurisdictional Immunities of States and Their Properties ("U.N. Convention"), *opened for signature* January 17,

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[18] The issue presented in this case turns on the construction of a U.S. statute, in light of Congressional intent, rather than a court use of "the law of nations" to affect private rights. *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004). To the extent Congress intended the FSIA to reflect international practice, it would not be inappropriate to consult contemporaneous treaties as an example of international practice, even if the United States had not acceded to these treaties. This Court has recognized that in cases where international practice is relevant a court may consult treaties as evidence of "the usages of civilized nations," even in the absence of U.S. accession. *Sosa v. Alvarez-Machain*, 542 U.S. at 734 (*citing The Paquete Habana*, 175 U.S. 677, 700 (1900) (a prize case)).

[19] *See* Council of Europe Treaty Office, Status of European Convention on State Immunity, at http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=074&CM=7&DF=12/26/2006&CL=ENG.

2005, 44 I.L.M. 803, which was approved by the United Nations General Assembly only in December 2004, and does not appear to be in force anywhere.[20] Article 9 of the European Convention denies immunity for "obligations arising out of [the state's] rights or interests in, or use or possession of, immovable property." 11 I.L.M. at 473. Similar language appears in Article 13 of the U.N. Convention. 44 I.L.M. at 808.

Although the wording of each Convention is quite unlike that of Section 1605(a)(4), and even though the U.N. Convention postdates the FSIA by almost 30 years, the Second Circuit interpreted each of these conventions as supporting its construction of the FSIA under which the jurisdiction of U.S. courts would extend to suits "arising out of the foreign state's obligations stemming from its ownership of property." Pet. App. at 13. In fact, neither convention supports the Second Circuit's interpretation of Section 1605(a)(4).

In the first place, neither convention provides any basis for jurisdiction over real property tax claims. Article 29 of the European Convention explicitly *excludes* proceedings covering "customs duties, taxes or penalties" from its coverage. 11 I.L.M. at 481. Indeed, the Council of Europe's Explanatory Report states: "Article 9 covers . . . proceedings relating to the payments due from a State for the use of immovable property . . . *with the exception of dues or taxes* (*see* Article 29, sub-paragraph (c))." Council of Europe, European Convention on State Immunity: Explanatory

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[20] Under Article 30 the U.N. Convention was to come into force upon the ratification by 30 members. Under Article 28 the Convention remained open for signature until January 17, 2007. As of that date it appears the treaty has not entered force.

Report ¶ 44, *at* http://conventions.coe.int/Treaty/en/Reports/Html/074.htm (last visited February 21, 2007) (emphasis added). The U.N. Convention likewise does not allow suits to recover taxes or to impose tax liens on foreign state-owned property. Early drafts of the U.N. Convention included *both* an immovable property exception (mirroring the provision ultimately adopted as Article 13) and also a separate provision waiving immunity for suits to collect taxes on real property used for *commercial* purposes. *See* Special Rapporteur's Sixth Report on Jurisdictional Immunities of States and Their Property, U.N. Doc. A/CH.4/376, January 31, 1984, at 21-25, *available at* http://untreaty.un.org/ilc/documentation/english/a_cn4_376.pdf. Had the U.N. Convention's "immovable property exception" been understood to allow tax enforcement suits, the separate provision would have been unnecessary. *See, e.g.*, *Foster v. Neilson*, 27 U.S. 253, 311 (1829) (every clause of treaty should be given meaning). Furthermore, the tax exception of the U.N. Convention was ultimately deleted, as inappropriate to a document that was intended to address only disputes between states and private persons, rather than state-to-state relations. *See Summary Records of Meetings of the 2220th Meeting*, [1991] 1 Y.B. Int'l L. Comm'n 84, U.N. Doc. A/CN/4/SER.A/1991.

Second, the language of both conventions differs in very material respects from that of Section 1605(a)(4). Article 9 of the European Convention abrogates immunity for suits involving not only a foreign state's "rights or interests in, or its use or possession of, immovable property," but also its "obligations arising out of its rights or interests in, or use or possession of, immovable property." 11 I.L.M. at 473. Article 13 of the U.N. Convention similarly provides an exception to immunity in cases involving

not only "any right or interest of the State in, or possession of," immovable property, but also "any obligation of the State arising out of its interest in, or its possession or use of, immovable property." 44 I.L.M. at 808. As previously discussed, and as the Second Restatement reflects, prior to the FSIA, suits "arising out of" real property "obligations" were generally barred by sovereign immunity both in the United States and elsewhere. Thus, the legal regime sought to be established by the two conventions, at minimum, represented a sharp break with prior international law.

Third, although the U.N. Convention postdates the FSIA by almost 30 years, and was therefore not available to Congress in 1976, Congress was at least aware of the European Convention, upon which the Second Circuit so heavily relied, and the FSIA's legislative history confirms that Congress's failure to adopt the language of the European Convention's immovable property exception was intentional. The European Convention's text was included in the hearing record, and the State Department's Acting Legal Advisor, Monroe Leigh, directly testified about it.[21]

When Congress drew on the European Convention's language, it acknowledged the source of its borrowing. For example, both the FSIA and the European Convention contain a "counterclaim exception" providing that when a foreign state commences an action in a domestic court, it loses sovereign immunity for counterclaims "arising out of" the subject matter of the foreign state's claims. *Compare* 28

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[21] Jurisdiction of U.S. Courts in Suits Against United States: Hearings on H.R. 11315 Before the House Subcomm. on Admin. Law and Gov. Relations of the Comm. on the Judiciary, 94th Cong. 37-50 (1976).

U.S.C. § 1607(b) (exception to sovereign immunity for counterclaims "arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state"), *with* European Convention, art. 1(2)(a) (exception to sovereign immunity for counterclaims "arising out of the legal relationship or the facts on which the principal claim is based"). 11 I.L.M. at 470. The House Report explains the similarity of the language in FSIA's counterclaim exception and the European Convention's counterclaim exception on the basis that FSIA Section 1607(b) is "based upon article 1 of the European Convention." H.R. Rep. No. 94-1487 at 23, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6622 (1976). The House Report on Section 1605(a)(4) contains no reference to the European Convention. *See* H.R. Rep. No. 94-1487 at 20, 1976 U.S.C.C.A.N. at 6618-19. That Congress used the European Convention's broad "arising out of" language in the counterclaim exception of the FSIA, but chose narrower "in issue" language in the immovable property exception, provides further evidence that Congress did not consider the different literal terms to convey the same meaning. *See, e.g., United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely").

Finally, if there is any international agreement that illustrates pre-1976 international practice regarding tax enforcement proceedings, it was a treaty to which the United States had acceded, the Vienna Convention on Diplomatic Relations ("Vienna Convention"), *done* April 18, 1961, 23 U.S.T. 3227 (entered into force with respect to the United States December 13, 1972), and not treaties to which the United States has never acceded and in which,

in one case, has never gone into effect anywhere. The House Report on the FSIA specifically refers to the Vienna Convention in its discussion of the immovable property exception to immunity in Section 1605(a)(4) and reflects Congress's understanding that the FSIA was consistent with the Vienna Convention. H.R. Rep. No. 94-1487 at 20, 1976 U.S.C.C.A.N. at 6619. Consistent with the Vienna Convention, Congress could not have opened U.S. courts to real property tax enforcement actions against foreign governments or their diplomatic personnel. Articles 34 and 37 of that Convention *exempt* a foreign mission's diplomatic agents, staff and their families from liability for any taxes on "immovable property" that is held "on behalf of the sending State for the purposes of the mission." 23 U.S.T at 3242, 3244. Articles 31 and 37 preserve their immunity from the receiving State's civil jurisdiction to enforce *any* claim relating to real estate that they hold "for the purposes of the mission." 23 U.S.T. at 3240, 3244. Furthermore, although Article 31 excludes from immunity any "*real action* relating to private [non-mission] immovable property" in the receiving state's territory (23 U.S.T. at 3240), the term "a real action" excludes "actions for recovery of rent or performance of other obligations *deriving from ownership or possession of immovable property*." Eileen Denza, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations* 238 (2d ed. 1998) (emphasis added). *Accord, Logan v. Dupuis*, 990 F. Supp. 26, 29 (D.D.C. 1997) (citing 1976 edition of Denza treatise). In sum, to interpret Section 1605(a)(4) as creating jurisdiction over the City's tax enforcement claim would be inconsistent with the Vienna Convention, to which the United States had acceded, as well as with prior international understandings.

IV. The Legislative History of FSIA Does Not Support a Reading of the Immovable Property Exception At Odds with Its Literal Terms and Pre-existing International Understanding.

A. The Legislative History Fails to Demonstrate Any Congressional Intent to Expand the Real Property Exception beyond Issues of Title and Possession.

The Second Circuit erred also when it read the Report of the House Judiciary Committee on H.R. 11315, the bill that was ultimately adopted by Congress, as confirming its "arising under" interpretation.[22] The court cited two passages from the House Report, H.R. Rep. No. 94-1487. The first of these says Section 1605(a)(4) "denies sovereign immunity in litigation relating to rights in real estate," Pet. App. at 10 (quoting H.R. Rep. No. 94-1487 at 20, 1976 U.S.C.C.A.N. at 6618). The second merely says that the Vienna Convention seems to permit the host state "the right to adjudicate questions of ownership, rent, servitudes, and similar matters," even where foreign mission property is involved. Pet. App. at 11 (quoting H.R. Rep. No. 94-1487 at 20, 1976 U.S.C.C.A.N. at 6619). Without any further explanation the Second Circuit read these passages to "make clear that *any* actions that do not disturb a foreign state's possession of the premises are permitted,

[22] Through a mix-up, both Houses attempted to adopt both H.R. 11315 and the identical Senate bill, S.3533, but as there remained some doubt as to whether the Senate bill was properly enrolled, the President signed only the House version and vetoed the Senate version. 12 Weekly Comp. Pres. Doc. 1554 (Oct. 22, 1976). The House Report is therefore regarded as authoritative, although the Senate Report is identical.

up to and including suits involving questions of ownership." Pet. App. at 11 n.7 (emphasis added).

The House Report does not bear the Second Circuit's expansive interpretation. In the first place, the cited passage from the House Report refers specifically to Article 22 of the Vienna Convention, which provides in pertinent part: "The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution." 23 U.S.T. at 3238. To the extent that the House Report expresses the view that the proposed FSIA was consistent with the Vienna Convention, this passage must be understood in light of the very next Article of the Vienna Convention, Article 23, which provides: "The sending State and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered."[23] 23 U.S.T. at 3238.

The House Report should also be read in light of the analysis of the "immovable property" exception that the Administration had provided in connection with the draft legislation presented by Secretary of State Rogers and Attorney General Kleindienst, which was ultimately

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[23] As discussed above, although the Vienna Convention does contain an exception to immunity for "real actions" (Vienna Convention, art. 23, 23 U.S.T. at 3238), it excludes from that exception those lawsuits that are based upon the "performance of ... obligations deriving from ownership or possession of immovable property." Eileen Denza, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations* 238 (2d ed. 1998).

enacted without change as Section 1605(a)(4) of the FSIA. *See* Immunities of Foreign States: Hearing on H.R. 3493 Before the House Subcomm. on Admin. Law and Gov. Relations of the Comm. on the Judiciary, 93rd Cong. at 41-42 (1973) (Attachment to Statement of Charles M. Brower, Acting Legal Advisor, State Department). The House Report adopts this analysis almost verbatim. *See* H.R. Rep. No. 94-1487 at 20, 1976 U.S.C.C.A.N. at 6618-19. In his written statement to the House Subcommittee with respect to the proposed legislation, Acting Legal Advisor Brower described the draft exception as "in keeping with the law at the present time." Immunities of Foreign States: Hearing on H.R. 3493 Before the House Subcomm. on Admin. Law and Gov. Relations of the Comm. on the Judiciary, 93rd Cong. at 21 (1973). The State Department's understanding of "the law at the present time" was that expressed in the U.S. Government's brief as *amicus curiae* to the New York Court of Appeals in *Republic of Argentina*, 25 N.Y.2d 262: A host government "may not compel the payment of a tax" by a judicial proceeding against a foreign government's property.[24]

The most that can be reasonably gleaned from the House Report is that *some* disputes about rent and other matters may be subject to jurisdiction where resolution of the dispute requires a determination of who lawfully owns or is entitled to possession of the rental property. That is the conclusion Judge Scalia drew in *Reclamantes*:

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[24] Bruno Ristau, the Government's counsel in the *Argentina* case, sat next to Mr. Brower, and testified himself before the Subcommittee. *See* Immunities of Foreign States: Hearing on H.R. 3493 Before the House Subcomm. on Admin. Law and Gov. Relations of the Comm. on the Judiciary, 93rd Cong. at 28 (1976).

"Reference to such actions [for rent] in the legislative history of the FSIA . . . does not establish any departure from the traditional principle that the real estate exception to sovereign immunity is bounded by concern for those issues [of title and possession]." 735 F.2d at 1523 n.5. The First Circuit drew the same conclusion in *Fagot-Rodriguez v. Republic of Costa Rica,* 297 F.3d 1, 12-13 (1st Cir. 2002). Relying in part on the review of the FSIA's legislative history in *Reclamantes*, the First Circuit concluded that Section 1605(a)(4) does not provide a basis for jurisdiction for an action to recover rent on a property long since vacated by its diplomatic tenant.[25]

In contrast, the City's tax claim "relat[es] to rights in real estate" only in the same very general sense as a slip and fall claim: each seeks money from the property owner for its alleged failure to perform an obligation generally applicable to property owners, *i.e.*, the duty to keep the premises reasonably safe for visitors. However, as even the Second Circuit conceded, the "immovable property" exception from immunity does not subject a foreign mission to a "garden-variety tort claim." Pet. App. at 19 n.14.

Another subsection of the FSIA, 28 U.S.C. § 1605(a), excepts from immunity claims caused by a "tortious act or omission," but carves out from this exception from immunity claims based, among other things, on the failure of

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[25] The First Circuit also observed that many suits for rent are likely to fall under the distinct exception for lawsuits "based upon a commercial activity," *i.e.*, the rental contract between the mission and the property-owner, but it held jurisdiction lacking over the plaintiffs' claim against Costa Rica in the absence of any allegation that Costa Rica had ever entered into any lease with the plaintiffs. *Fagot-Rodriguez v. Republic of Costa Rica,* 297 F.3d at 6.

the foreign government to perform a discretionary function. In *MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 921 (D.C. Cir. 1987), for example, the D.C. Circuit concluded that a foreign chancery's unsightly renovation was a discretionary act and that therefore the "tortious act" exception from immunity did not apply.[26] To apply the "immovable property" exception to provide jurisdiction over such claims would allow litigants to circumvent the limits Congress placed on the "tortious act" exception from immunity.

B. The City's Statutory Tax Lien Is Not "Similar" to "Questions of Ownership, Rent, [and] Servitudes."

The Second Circuit gave little if any added weight to the City's claim that its statutory tax lien itself amounted to a "right in real property." Pet. App. at 21 n.16. The House Report's reference to "questions of ownership, rent, servitudes and similar matters" cannot support jurisdiction over the City's tax enforcement claim because the City's lien is neither a "right in real property," nor is it "similar" to a "question of ownership, rent, [or] servitudes." H.R. Rep. No. 94-1487 at 20, 1976 U.S.C.C.A.N. at 6619. As this Court held in *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 262 (1999), liens "are merely a means to the end of satisfying a claim for the recovery of money."

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[26] To be sure, the Peruvian chancery's "tort" had terminated at the time suit was filed (809 F.2d at 919), but there is nothing in the text of § 1605(b)(4) that limits the exemption to claims relating to current, as opposed to past, occupancy of real estate.

The City's lien is likewise merely a device through which the City seeks to enforce its tax claim. Indeed, United States law has generally distinguished between "rights in" real property and mere "security interests" in real property. The lien is not a "right in immovable property" as that phrase has traditionally been understood by United States courts. Rather, a lien is a mere "charge on [the] property," which "confers no general right of property." *Marine Midland Bank v. Marcal Enters., Inc.*, 398 N.Y.S.2d 782, 783 (N.Y. Co. Ct. 1977), *aff'd per curiam*, 407 N.Y.S.2d 833 (N.Y. App. Div. 1978); *see also* Restatement (First) of Property § 540, cmt. a (1944) (a lien is "merely additional security"); *Bertie's Apple Valley Farms v. United States*, 476 F.2d 291, 292 (9th Cir. 1973) (*per curiam*) (distinguishing between "title interest" in property as to which U.S. has not waived sovereign immunity and "lien interest"). Thus the New York courts have long held that a tax lien does not create "an estate or interest in the real property" sufficient to give the lienor standing to participate in an eminent domain proceeding. *Weinstein v. Taylor*, 234 N.Y.S.2d 926, 929 (N.Y. Sup. Ct. 1962), *aff'd mem.*, 242 N.Y.S.2d 707 (N.Y. App. Div. 1963). This body of established U.S. domestic law at the time the FSIA was enacted further reinforces Congress's intent to make a distinction between "rights in" real property and mere security interests (such as liens) when it enacted § 1605(a)(4).

The City's tax lien claim is unlike a claim to a "servitude" in another important respect. Easements and servitudes, like other questions of ownership, possession, and occupancy of property, turn upon local property law and are therefore appropriate for resolution in local courts. In contrast, resolution of the City's claim to a tax lien

would necessarily turn upon the taxability of foreign-government property, especially that occupied by diplomatic missions, a question that is not governed solely by local law, but rather by treaties such as the Vienna Convention on Diplomatic Relations. Nothing in the language or legislative history of Section 1605(a)(4) suggests that Congress intended these matters of U.S. treaty obligation, with their potential effect on international relations, to be resolved by a local court.

Furthermore, to rely on the statutory lien as itself sufficient to create a "property interest" in India's and Mongolia's diplomatic properties would in effect use the "device of the lien to create jurisdiction where none would otherwise lie." Pet. App. at 21 n.16. Such bootstrapping is contrary to 28 U.S.C. §§ 1609 and 1610, which forbid the use of pre-judgment attachment to establish jurisdiction, where jurisdiction would not otherwise lie. *See* H.R. Rep. 94-1487 at 26-27, 1976 U.S.C.C.A.N. at 6625-26. The sole exception to the anti-attachment principle is contained in 28 U.S.C. § 1605(b), which provides a basis for admiralty jurisdiction to enforce a maritime lien, but only when that lien is "based upon a commercial activity." To recognize the device of a statutory lien as a basis for jurisdiction over a suit based upon a foreign state's "public" non-commercial activity would erase the very distinction between public and commercial acts that lies at the heart of the FSIA. Furthermore, as the United States has already pointed out in its brief as *amicus curiae* in support of certiorari, New York law creates a multitude of statutory liens "related to real property." *See* Brief of the United States as Amicus Curiae at 16 n.9. Reliance on such liens to create jurisdiction would abrogate immunity over a wide variety of "garden variety" disputes merely because of the vagary of

state procedures for enforcing a claimant's rights against defendants generally.

C. The 2004 and 2005 Foreign Operations Appropriations Acts Do Not Illuminate the FSIA.

The Second Circuit also mistakenly relied on two appropriations laws that were enacted in 2004 and 2005, almost 30 years after the FSIA was written, to support its proposition that in 1976 Congress intended the "immovable property" exception to the FSIA to grant jurisdiction to U.S. courts to enforce a tax lien against a foreign government's property used exclusively to support its diplomatic mission. Pet. App. at 5-6. These appropriation laws require that 110% of any property taxes unpaid in the District of Columbia or New York City that have been determined to be owing "in a court order or judgment" be withheld from that country's foreign aid. Foreign Operations, Export Financing, and Related Programs Appropriations Act of 2006, Pub. L. 109-102, § 543, 119 Stat. 2172, 2214-15 (2005); Consolidated Appropriations Act of 2005, Pub. L. 108-447, § 543, 118 Stat. 2809, 3011-12 (2004).[27]

The Second Circuit's reliance on the two appropriation laws disregards this Court's repeated warning against using the "views of a subsequent Congress" to "infer[] the intent of an earlier one." *United States v. Price,* 361 U.S. 304, 313 (1960). This warning carries special force where

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[27] The language was first inserted into the Senate version of the 2005 appropriation act, without any explanation, by an amendment sponsored by Sen. Schumer (D-NY), and adopted by voice vote without debate. 150 Cong. Rec. S 9560-61 (daily ed. Sept. 23, 2004).

appropriations acts are concerned. *See TVA v. Hill,* 437 U.S. 153, 190 (1973); *Metro Broad., Inc. v. FCC,* 497 U.S. 547, 629 (1990) (O'Connor, J., joined by Rehnquist, C.J., Scalia and Kennedy, JJ., dissenting). The effect of later appropriations on extant substantive legislation must be "construed narrowly." *Donovan v. Carolina Stalite Co.,* 734 F.2d. 1547, 1558 (D.C. Cir. 1984) (Bork, J.) (*citing United States v. Langston,* 118 U.S. 389 (1886)). There is no reason to read these appropriations acts, as the Second Circuit appears to have read them, as a congressional endorsement of New York City's construction of the "immovable real property" exception, because these appropriations acts can still be given effect without reading Section 1605(a)(4) to provide jurisdiction over real property tax enforcement proceedings. For example, foreign governments retain the right to waive their sovereign immunity, take the offensive, and file suit challenging the validity of the tax as it applies to them. That is the course that Argentina successfully took 40 years ago, when it commenced an action to recover past taxes that it had improvidently paid and to declare that it had no obligation to pay taxes in the future. *Republic of Argentina v. City of New York*, 25 N.Y.2d at 257. If a foreign government followed that same course today, 28 U.S.C. § 1607 would provide a basis for jurisdiction over the City's counterclaim for back taxes, and if the City obtained a judgment the appropriation law would require a foreign aid set-off. [28]

[28] For example, the Kingdom of Denmark recently sued the City of Los Angeles to recover transfer taxes it had paid with respect to its consul's official residence in that city. The City counterclaimed, and the Superior Court entered judgment against the City. *See* docket of *Foreign Ministry of the Kingdom of Denmark v. City of Los Angeles,* SC 079161 (Cal. Super. Ct., L.A. Co.) *at* http://www.lasuperiorcourt.org/

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The FSIA's exception for actions "based on a commercial activity" provides an independent basis for jurisdiction to enforce a tax where some or all of the property has been leased to domestic tenants or used for commercial purposes such as a retail store. 28 U.S.C. § 1605(a)(2). As such, Congress's requirement to deduct some nations' unpaid property tax obligations from U.S. foreign aid by no means requires or even suggests that the FSIA's "immovable property" exception must encompass jurisdiction for actions to enforce a tax assessment against these governments. The Second Circuit's attempt to rewrite the statutory text and history with appropriation riders adopted 30 years later is unsupportable and should not be permitted.

V. The City's Alternative Basis for Jurisdiction – That Requiring Their Diplomats to Reside at Their Missions Constitutes "Commercial Activity" – is Plainly Inapplicable and Should Be Rejected.

Neither the district court nor the Second Circuit relied on the City's alternative argument – that the decision of India and Mongolia to require their diplomatic staff to live at their respective missions fell within the "commercial activity" exception for the FSIA. 28 U.S.C. § 1605(a)(2). There is no factual dispute about the nature of the activity in which the diplomats of India and Mongolia are involved when they reside at the missions: they engage in governmental functions. India and Mongolia require their diplomats to live at the missions as a matter of governmental policy to assure real-time responsiveness to the foreign

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civilCaseSummary/index.asp?CaseType=Civil (last visited February 21, 2007).

ministries, to promote diplomatic security, and to advance the cultural and political functioning of the missions. The City's characterization of these governments' activity as "commercial" is baseless. The "commercial activity" exception applies when the foreign government "exercises 'only those powers that can also be exercised by private citizens,'" by entering into a market-based relationship with private actors. *Saudi Arabia v. Nelson*, 507 U.S. at 360 (quoting *Republic of Argentina v. Weltover, Inc.*, 504 U.S. at 614). The exception does not apply to acts that only a sovereign can perform. *Saudi Arabia v. Nelson*, 507 U.S. at 362. It certainly does not apply to a sovereign's relationship with its own diplomatic personnel.

Like the police actions at issue in *Saudi Arabia v. Nelson* the operation of a diplomatic mission is "peculiarly sovereign in nature." 507 U.S. at 361. The House Report on the FSIA specifically recognized that, the employment relationship between a foreign state and its diplomats is "public or governmental and not commercial in nature." H.R. Rep. No. 94-1487 at 16, 1976 U.S.C.C.A.N. at 6615. That private employers may have business reasons for providing rent-free housing to their employees cannot transform India's and Mongolia's staffing decisions into "commercial" activities, because how foreign governments deploy their diplomatic personnel is "peculiarly sovereign" in its very nature. *See Saudi Arabia v. Nelson*, 507 U.S. at 361 (recognizing that foreign state's "internal administrative acts" remain immune); *Butters v. Vance International, Inc.*, 225 F.3d 462 (4th Cir. 2000) (foreign government's decision how best to secure the safety of its leaders is "quintessentially an act 'peculiar to sovereigns'").[29] Since any reliance on the

[29] *Nelson* refers to the list of "public" activities that remain immune under the restrictive theory contained in *Victory Transport, Inc. v.*

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"commercial activity" exemption as a jurisdictional basis for the City's action would be without merit beyond cavil, this action should be remanded with directions that it be dismissed.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the judgment of the Second Circuit be reversed.

Respectfully submitted,

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Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 360 (2d Cir. 1964), which list also includes "acts concerning diplomatic activity."